No. 88-1597

Supreme Court, U.S.
FILED
OCT 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), et al.,

Petitioners,

v.

BRIDGET C. MERGENS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. DOES THE SCHOOL OFFICIALS' BAN OF A VOLUNTARY STUDENT-INITIATED BIBLE CLUB CONSTITUTE AN UNCONSTITUTIONAL INFRINGEMENT ON THE STUDENTS' FREE SPEECH RIGHTS AS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS?

- A. Do Public School Students Have First Amendment Rights of Freedom of Speech and Freedom of Association?
  - 1. Are Religious Discussion and Worship Forms of Speech Protected By the First Amendment?
- B. Can the Voluntary, Student-Initiated Bible Club Be Banned From the Club and Organization System at Westside High School?
  - 1. Is the Club and Organization System at Westside High School an Open Public Forum?
  - 2. Is the School Board's Content-Based Ban Justified By a Compelling State Interest?
    - a. Is the School Board's Ban Content Based?
    - b. Do School Officials Have a Compelling State Interest?
  - 3. Is the School Officials' Ban Narrowly Tailored?
- C. Is the School Officials' Ban of a Student-Initiated Bible Club Unconstitutional Because It Is An Effort To Suppress Expression Merely Because They Oppose the Students' Viewpoints?
- D. Is the School Officials' Ban of the Bible Club A Reasonable Time, Place and Manner Regulation?

II. DOES THE BAN OF A STUDENT-INITIATED BIBLE CLUB CONSTITUTE A VIOLATION OF THE STUDENTS' DUE PROCESS RIGHTS BECAUSE OF THE LACK OF OBJECTIVE STANDARDS AND PROCEDURAL SAFEGUARDS WHICH RESULTED IN THE SCHOOL OFFICIALS' EXERCISE OF ARBITRARY DISCRETION?

QUESTIONS PRESENTED – Continued

A. Did School Officials Exercise Impermissible Discretion In Refusing to Allow the Student-Initiated Bible Club To Meet On the Westside High School Campus?

B. Is the School Officials' Ban of the Student-Initiated Bible Club Void for Vagueness?

III. IS THE EQUAL ACCESS ACT CONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS?

A. Has Westside High School Established A Limited Open Forum Under the Equal Access Act?

B. Does the Equal Access Act Violate the Establishment Clause of the First Amendment?

1. Does the Equal Access Act Have a Secular Purpose?

2. Does Equal Access Have the Primary Effect of Advancing Religion?

3. Does an Equal Access Policy Foster Excessive Government Entanglement With Religion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. THE SCHOOL OFFICIALS' BAN OF A VOLUNTARY, STUDENT-INITIATED BIBLE CLUB IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE STUDENTS' FREE SPEECH RIGHTS AS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS 11

A. Public School Students Have First Amendment Rights of Freedom of Speech and Freedom of Association 11

1. Religious Discussion and Worship are Forms of Speech Protected By the First Amendment 19

B. The Club System At Westside High School Is A Public Forum From Which A Voluntary, Student-Initiated Bible Club May Not Be Banned 19

1. The Club and Organization System at Westside High School Constitutes An Open Public Forum 19

2. The School Officials' Content-Based Ban Is Not Justified By a Compelling State Interest 21

TABLE OF CONTENTS – Continued

Page

a. The School Officials' Ban is Content Based 21

b. The School Officials Have Not Shown a Compelling State Interest..... 22

3. The School Officials' Ban Is Not Narrowly Tailored 25

C. The School Officials' Ban of a Student-Initiated Bible Club is Unconstitutional Because It Is An Effort To Suppress Expression Merely Because They Oppose the Students' Viewpoints 26

D. The School Officials' Ban of the Bible Club Is Not A Reasonable Time, Place and Manner Regulation 28

II. THE BAN OF A STUDENT-INITIATED BIBLE CLUB CONSTITUTES A VIOLATION OF THE STUDENTS' DUE PROCESS RIGHTS BECAUSE OF THE LACK OF OBJECTIVE STANDARDS AND PROCEDURAL SAFEGUARDS WHICH RESULTED IN THE SCHOOL OFFICIALS' EXERCISE OF ARBITRARY DISCRETION 29

A. The School Officials Exercised Impermissible Discretion..... 29

B. The School Officials' Ban of the Student-Initiated Bible Club Is Vague 31

III. THE EQUAL ACCESS ACT IS CONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS 33

TABLE OF CONTENTS – Continued

Page

A. Westside High School Has Established A Limited Open Forum Under The Equal Access Act 34

B. The Equal Access Act Does Not Violate the Establishment Clause of the First Amendment 40

1. The Equal Access Act Has A Secular Legislative Purpose..... 41

2. Equal Access Does Not Have the Primary Effect of Advancing Religion..... 42

3. An Equal Access Policy Does Not Foster Excessive Government Entanglement With Religion 46

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES:

Ambach v. Norwick, 441 U.S. 68 (1979) 26

Bates v. City of Little Rock, 361 U.S. 516 (1960) 15

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 24, 25, 45

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 16

Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987) 8, 19, 26, 33, 34

Board of Education v. Pico, 457 U.S. 853 (1982) .. 13, 45

Boos v. Barry, 485 U.S. ___, 108 S.Ct. 1157 (1988) 21, 25, 27

Broadrick v. Oklahoma, 413 U.S. 601 (1974) 32, 33

Brown v. Board of Education, 347 U.S. 483 (1954). 29, 35

Buckley v. Valeo, 424 U.S. 1 (1979) 32, 33

Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) 12

Cantwell v. Connecticut, 310 U.S. 296 (1940) 23, 46

Carey v. Brown, 447 U.S. 455 (1980) 9, 21, 25

Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985) 26, 27, 28, 30

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 28, 30

County of Allegheny v. American Civil Liberties Union, 492 U.S. ___, 109 S.Ct. 3086 (1989) 10, 25, 27, 43

Cox v. Louisiana, 379 U.S. 536 (1965) 22

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1985) 44

Edwards v. Aguillard, 482 U.S. 578 (1987) 23, 41, 43

Engel v. Vitale, 370 U.S. 421 (1962) 23

TABLE OF AUTHORITIES – Continued

Page

Epperson v. Arkansas, 393 U.S. 97 (1968) 18, 42

Everson v. Board of Education, 330 U.S. 1 (1947) 24

Frisby v. Schultz, 487 U.S. ___, 108 S.Ct. 2495 (1988) 28

Grayned v. City of Rockford, 408 U.S. 104 (1972) . 29, 32

Hazelwood School District v. Kuhlmeir, 484 U.S. ___, 108 S.Ct. 562 (1988) 6, 15, 19

Healy v. James, 408 U.S. 169 (1972) 8, 14, 15, 18

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 19, 28

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 23

Houston v. Hill, 482 U.S. 451 (1987) 9

Hunt v. McNair, 413 U.S. 734 (1973) 42

Katzenbach v. Morgan, 384 U.S. 641 (1966) 44

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 13

Kolender v. Lawson, 461 U.S. 352 (1983) 31, 32

Kovacs v. Cooper, 336 U.S. 77 (1949) 29, 34

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 47

Lemon v. Kurtzman, 403 U.S. 602 (1971) ...10, 22, 40, 41, 44

Lewis v. City of New Orleans, 430 U.S. 130 (1974) 31, 32

Lovell v. City of Griffin, 303 U.S. 444 (1938) 19, 20

Lynch v. Donnelly, 465 U.S. 668 (1984) 25, 40, 41, 42, 43

McDaniel v. Paty, 435 U.S. 618 (1978) 24

McGowan v. Maryland, 366 U.S. 420 (1961) 42

TABLE OF AUTHORITIES – Continued

Page

Mergens v. Board of Education, No. CV 85-0-426, Slip Op. (1988) (reproduced in Pet. For Certiorari: Appendix B-11) ..... *passim*

Mergens v. Board of Education, 867 F.2d 1076 (8th Cir. 1989) ..... *passim*

Meyer v. Nebraska, 262 U.S. 390 (1923) 11

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 44

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 14

NAACP v. Button, 371 U.S. 415 (1963) 25

New York v. Ferber, 458 U.S. 747 (1985) 9, 32

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 22

Niemetko v. Maryland, 340 U.S. 268 (1951) 19, 25, 29

O'Hair v. Andrus, 198 U.S. App. D.C. 198, 613 F.2d 931 (D.C. Cir. 1979) 46

Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37 (1983) 20, 26, 28

Plessy v. Ferguson, 163 U.S. 537 (1896) 29

Police Department v. Mosley, 408 U.S. 92 (1972) .. 22, 31

Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976) 42

TABLE OF AUTHORITIES – Continued

Page

Saia v. New York, 334 U.S. 558 (1948) 19

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 28

Schneider v. State, 308 U.S. 147 (1939) 15, 19, 20, 29

School District v. Schempp, 374 U.S. 203 (1963) ... 23, 43, 45

Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) 30

Shelton v. Tucker, 364 U.S. 479 (1960) 9, 13, 25

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 20

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 20

Stone v. Graham, 449 U.S. 39 (1980) 23, 42

Texas Monthly v. Bullock, 489 U.S. ___, 109 S.Ct. 890 (1989) 10, 42, 43

Thomas v. Review Board, 450 U.S. 707 (1981) 18

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 8, 11, 12, 13, 15, 16, 18, 45

Tilton v. Richardson, 403 U.S. 672 (1971) 40

United States v. American Trucking Association, 310 U.S. 534 (1940) 34

United States v. Grace, 461 U.S. 171 (1983) 28

Wallace v. Jaffree, 472 U.S. 29 (1985) 25, 43

Walz v. Tax Commission, 397 U.S. 664 (1970) 46

TABLE OF AUTHORITIES – Continued

Page

Ward v. Rock Against Racism, 491 U.S. ___, 109 S.Ct. 2746 (1989) 21, 25

Wayte v. United States, 470 U.S. 586 (1985) 22

West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943) 13

Whitney v. California, 274 U.S. 357 (1927) 22

Widmar v. Vincent, 454 U.S. 263 (1981) ..... *passim*

Wisconsin v. Yoder, 406 U.S. 205 (1972) 21, 23

Zorach v. Clauson, 343 U.S. 306 (1952) 9, 24, 45

CONSTITUTIONS AND STATUTES:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V 22

U.S. Const. amend. XIV 9, 11, 18, 23, 31, 33

Title 20 U.S.C. § 4071 ..... *passim*

Title 20 U.S.C. § 4072 ..... 3, 35

The 4-Way Test Of The Things We Think, Say Or Do (Rotary International, Evanston, Illinois) 27, 38

Hearing Before the Senate Committee on Judiciary on S.815 & S.1089, 98th Cong., 2d Sess., April 28, 1983 and August 3, 1983 at 37 44

S. Rep. No. 357, 98th Cong., 2d Sess. 43, 44

TABLE OF AUTHORITIES – Continued

Page

128 Cong. Rec. (daily ed. Sept. 17, 1982)

S11781 34

130 Cong. Rec. (daily ed. June 27, 1984)

S8332 ..... 10, 33, 34

S8335 34

S8337 33

S8340 34

S8342 ..... 36, 37, 38, 39

S8343 ..... 37, 39

S8348 47

S8355 ..... 33, 47

S8356 34

S8358 34

S8360 34

S8362 37

S8365 33

S8370 33

130 Cong. Rec. (daily ed. July 25, 1984)

H7730 33

H7732 37

H7734 ..... 33, 41

H7737 33

H7740-41 33

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U.L. Rev. 1 (1986) 25

Religious Speech Protection Act: Hearing on H.R. 4996 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. Education and Labor, 98th Cong., 2nd Sess. 47 (1984) 12

Webster's Third New International Dictionary (1967) 36

Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools, 92 Yale L.J. 499 (1983) 18

Note, Religious Expression On The Public School Forum: The High School Students' Right To Free Speech, 72 Geo. L.J. 135 (1983) 18

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On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Westside High School (WHS) is a public secondary school as defined by Nebraska State Law.[1] (J.A. 57). Located in Omaha, Nebraska, WHS is organized as part of the Westside Community School system, an independent public school district managed by the Board of Education of Westside Community Schools. *Id.* WHS receives federal financial assistance. *Id.* Respondents, Bridget C. Mergens, et al., are students at WHS who desire to form a voluntary student-initiated Bible Club. (J.A. 72, 116-17, 133). Had school officials allowed them to meet, the students envisioned using "any empty classroom in the morning or after school" on the WHS campus. (J.A. 78, 117). As proposed to school officials, the Bible Club meetings would have included Bible study, prayer and discussions of relevant topics in an effort to encourage personal and spiritual growth. (J.A. 73-77, 154-55, 185, 190). Christian fellowship, Bible reading, worship and prayer are a vital part of the daily lives of these students. (J.A. 75, 131, 163). The student-initiated Bible Club sought the same rights, privileges, terms and conditions accorded to other clubs at WHS. (J.A. 105, 109). Simply put, the students wanted equal treatment, nothing more, nothing less.[2]

The school board maintains WHS for the benefit of its students and it provides, by policy and practice, for the dissemination of a wide range of ideas to those required to

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[1] The School Officials and students, in a pretrial stipulation, agreed that WHS is a secondary school "as defined by the Equal Access Act." (Pretrial Order No. 2, J.A. 57). WHS served students in grades 10-12.

[2] Although the students wanted the same rights, privileges, terms and conditions as other clubs, they were willing to allow the school to make announcements in the school paper or the public address system to the effect that the school did not endorse the content of the Bible Club. (J.A. 73).

attend WHS.[3] Over thirty student clubs and activities are recognized by school officials at WHS.[4] (J.A. 479). Several of these clubs are not related to the school's curriculum. For instance, "Peer Advocates" is a "service activity" club at WHS that allows WHS students to work with handicapped students. Dr. Findley, Principal of WHS, testified at trial that "Peer Advocates" *is not curriculum* related:

> Q – Did Peer Advocates, when you were looking at it, relate to any of the required curriculum or elective courses at Westside High School?
>
> A – No.

(J.A. 231).

Permitting both curricular and noncurricular clubs accords with school officials' recognition that the "primary liberties in a student's life involve the process of inquiry and learning, of acquiring and imparting knowledge, and of exchanging ideas." (J.A. 489 [School Policy 5450]). In addition to clubs and activities, a school newspaper is published by the students (J.A. 136, 262-66, 326-27) and the administration invites speakers and organizations from the general public to participate in club activities and classes. (J.A. 95-96,

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[3] Indeed, the school has shown the movie "The Omen" concerning devil worship (J.A. 171). Abortion and homosexuality were also discussed *in class* at WHS. (J.A. 125). Yet, a voluntary, student-initiated Bible Club was not allowed to meet. Bible Club students could have discussed such controversial subjects from a Biblical perspective if permitted to meet on campus. (J.A. 75).

[4] As of August, 1984, the following Clubs and activities were recognized at WHS: Band, Chess Club, Cheerleaders, Choir, Class Officers, Computer Club, Distributive Education, Speech and Debate, Drill Squad and Squires, Future Business Leaders of America, Future Medical Assistants, Interact (associated with Rotary International), International Club, Latin Club, Math Club, Student Publications, Student Forum, Dramatics, Creative Writing Club, Photography Club, Orchestra, Outdoor Education, Swimming Timing Team, Student Advisory Board, Intramurals, Competitive Athletics, Zonta Club (associated with Zonta International girls association), Subsurfers, Welcome to Westside Club, Wrestling Auxiliary, National Honor Society and Peer Advocates. (J.A. 231, 479-487).

167-68, 175, 268-70, 279-81, 307-08, 360, 375-76, 451). Students are encouraged to "express opinions, to take stands, and to support causes, publicly or privately, in a manner consistent with the rights of others and the lawful functions and objectives of the school and school district." (J.A. 489). Yet, the students desiring to form a Bible Club were treated differently. (J.A. 72). They were banned not only from the club forum, but from meeting on a regular basis anywhere on the WHS campus. (J.A. 452).

Students attending WHS are told that they can organize and participate in a variety of student clubs and organizations which meet after school hours on school grounds. (J.A. 221-222, 297-298, 358, 479, 488). Superficially, clubs are allegedly "sponsored" by the assignment of "faculty sponsors." In most cases, these "sponsors" are monitors performing purely custodial functions. (J.A. 92, 111-12, 123-24). Several club "sponsors" did not regularly attend the club meetings. (J.A. 92). Kevin Dale Coates, a WHS student, testified that the "faculty sponsor" of the Computer Club was not a member of the teaching faculty of WHS and attended only "about a fourth" of the meetings. (J.A. 182). Likewise, Respondent Mergens testified that the "sponsor" of the Drama Club did not attend all of the meetings and "*sometimes* he would come back and lock up after we were done." (J.A. 92) (emphasis added). Student testimony was confirmed by Dr. Findley, the WHS Principal. Dr. Findley testified, with regard to the role of the faculty sponsor, "that there's not someone there all the time" monitoring the Club.[5] (J.A. 247). Some

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[5] The Equal Access Act, 20 U.S.C. § 4071(c)(2) (1984) prohibits the "sponsorship of the meeting by the school, the government, or its agents or employees." The term "sponsorship", however, as defined by the Act, prohibits participation, leading or promotion of the meeting by the school. "*The assignment of a teacher, administrator, or other school employee to meeting for custodial purposes does not constitute sponsorship.*" 42 U.S.C. § 4072(2) (emphasis added). In fact, the policy and practice of club sponsorship at WHS (J.A. 92, 111-12, 123-24, 182, 247) accords with the limited, "custodial," role permitted under the Equal Access Act. 20 U.S.C. § 4072(2).

sponsors receive remuneration for their services, while others do not. (J.A. 239).

School Board policy 5610 recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." (J.A. 488). Policy 5610 does not provide a procedure for the formation of clubs and organizations and there are no formal written guidelines for club creation. (J.A. 231, 240-41, 292-93, 359-60). At WHS, the practice is to direct student requests for club formation to Ronald Huston, the Activities Director, who analyzes proposals and determines compatibility with the missions and goals of WHS. (J.A. 231).

School Administrators testified that the Bible Club would be in accord with the goals and missions of WHS. (J.A. 234, 254). Yet, the students' request for a Bible Club was denied, and the denial was based solely on the content of the proposed club. (J.A. 71, 81, 341).

In January, 1985, Bridget Mergens requested permission from Dr. Findley, the school principal, to form a Bible Club that would meet at WHS after school hours. (J.A. 72). As stated previously, she requested that the club be treated in the same manner as other WHS clubs, but indicated that assignment of a faculty sponsor would not be required if the school could not or would not provide one. (J.A. 83-85). At the time of her request, Bridget Mergens was unaware of the requirements for forming a club but was "very willing to oblige whatever the school policy was." (J.A. 85). Immediately, Dr. Findley advised Bridget Mergens that she would not be permitted to meet due to the content of the proposed club. (J.A. 72, 81, 85-86, 246, 347-49, 373-74).

In February, 1985, Bridget Mergens again presented her request to Dr. Findley, together with Dr. James Tangdall, Associate Superintendent of Schools. This second request was discussed with School Superintendent Kenneth Hansen and all three officials agreed that the initial decision be upheld and that the Bible Club request would be denied based on the "separation of church and state" and administrative interpretation of school policy. (J.A. 341, 345-46). Administrators

agreed that students could discuss religious topics informally but that informal religious meetings conducted *by a group of students on a regular basis would be prohibited*. (J.A. 431-34, 451-54) (emphasis added). Bridget Mergens was given no opportunity to clarify her request or to discuss the purpose, goals and activities of the Bible Club with any school official. The denial was an immediate hysterical response to the idea of a "Bible Club."

On March 4, 1985, Bridget Mergens presented her request to the Westside Community Schools Board of Education. At the meeting, she stressed that students wanted to meet after school hours on a voluntary basis and that a faculty sponsor would not be necessary unless required by the school. (J.A. 59:15, 464-67). The school board voted to uphold the administrative decision denying permission to conduct a Bible Club at WHS (J.A. 467). No other student group has been denied access to WHS on the basis of the content of speech.[6] In this case, WHS students have been denied the right to meet at WHS for religious discussion after school hours. (J.A. 431-34, 451-54).

On April 17, 1985, five students and their parents brought suit against the school district, school administrators and school board members in the United States District Court for the District of Nebraska. The Complaint alleged that denial of the students' right to meet as a Bible Club violated their freedom of speech, freedom of assembly, free exercise of religion and equal protection rights guaranteed by the First and Fourteenth Amendments of the United States Constitution, and by Article I of the Nebraska Constitution and the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) (EAA). In their Answer, the Defendants denied the applicability of the EAA to WHS and relied on the Establishment Clause as their defense. (J.A. 37-54).

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[6] Student safety concerns resulted in a denial of access for a Dungeon and Dragons Club and certain athletic club requests were turned down for other reasons. (J.A. 293-94, 309-10, 352, 367).

On April 8, 1987, the case went to trial. On February 2, 1988, the district court entered judgment for the Defendants, holding that WHS maintains a closed forum and that, therefore, the EAA does not apply to WHS. Further, the court held that the actions of the Defendants did not violate the First and Fourteenth Amendment rights of the students. Effectively, the court dismissed Petitioners' contention that the Establishment Clause constituted a compelling interest justifying exclusion of a Bible Club from WHS by its finding that students at WHS could distinguish between school-mandated religious activity and student-initiated religious activity. The court based its finding in this regard on two factors:

> First, the proposed format protects against the conferring of an imprimatur of school approval. Second, Dr. David Workman, [sic] an expert in the development of cognitive reasoning and intellectual development, testified that students over the age of 12 years can make sponsorship distinctions and that there is no significant differences between high school and college students in their abilities to understand endorsement or nonendorsement by the school. The court credits this evidence.

Mergens v. Board of Education, No. CV 85-0-426 Slip Op. (1988) (reproduced in Pet. For Certiorari, Appendix B-11)

The court's finding on the issue of impressionability was based on the testimony of Dr. David Moshman and on the testimony of students who had no interest in forming or participating in a Bible Club. These students testified that they would feel no compulsion to attend a Bible Club if one were permitted access to WHS and that they would not view the existence of such a club as the school favoring one religion over another. (J.A. 211-12, 214-15).

In deciding that the Bible Club could not be permitted access to WHS, the district court held that the administrators' unwritten policy, requiring presentation of a balanced view when political, religious and economic information is dispensed within WHS facilities, constitutes a "legitimate educational concern which reasonably justifies WHS's actions in this case." *Mergens, supra*, at 15.

On February 8, 1989, the Eighth Circuit Court of Appeals reversed, holding that WHS maintains a limited open forum under the EAA, that the EAA is constitutional and that this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), requires reversal. The appeals court noted that the WHS administrators' interpretation of "curriculum-related" would permit school officials to circumvent the EAA by administrative fiat while allowing them to arbitrarily deny unfavored student speech. *Mergens v. Board of Education*, 867 F.2d 1076, 1079 (8th Cir. 1989). Relying on legislative history, the court found that, by allowing a Chess Club to meet, as well as many other noncurriculum-related clubs, WHS had created a limited open forum for student speech. *Mergens*, 867 F.2d at 1079.

The eighth circuit decision noted that the EAA closely tracks this Court's decision in *Widmar*. In fact, the court found that the only difference between this case and *Widmar* is the extension of *Widmar* principles to the high school level. In light of congressional fact-finding that rejected the notion that high school students would confuse an equal access policy with state sponsorship of religion, the court held that the EAA does not violate the Establishment Clause. *Mergens*, 867 F.2d at 1079-80. The Court concluded by stating that *Widmar* compels the same result even in the absence of the EAA.[7] *Mergens*, 867 F.2d at 1080.

Finally, the limited scope of this case is to be noted. This case does not involve an off-campus group seeking access to the WHS facilities. This case does not involve disruption or interference with the academic purpose or atmosphere of the high school. This case does not involve religious activity during the school day or during mandatory school hours. This case does not involve an effort by these students to obtain any greater accommodation for Bible Club meetings than is made for other student clubs at WHS. This case simply involves the

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[7] Indeed, this Court need not reach the constitutionality or applicability of the EAA and can affirm the eighth circuit decision by applying this Court's precedent in *Widmar, supra*.

right of these religiously motivated students to use school facilities after school hours with the same rights and responsibilities as other clubs and on an equal basis, without favoritism or opposition from the administration. In sum, this case is *Widmar v. Vincent* at the public secondary school level.

SUMMARY OF THE ARGUMENT

1. The High School Students Desiring to Form the Bible Club Were Protected By the First Amendment.

The First Amendment to the United States Constitution protects the students at WHS who desired to form a student-initiated Bible Club to meet after school in any empty classroom. These students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1964). There has been no showing or finding that the Bible Club would have "materially and substantially interfered with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. To the contrary, the testimony established that the Bible Club would meet the missions and goals of WHS. (J.A. 256).

In addition to the students' freedom of speech, the School Officials' ban of the Bible Club violated the students' freedom of association. *Healy v. James*, 408 U.S. 169, 180 (1972). The affected students wanted to meet for Bible study, prayer and worship, which are forms of speech protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263 (1981). Equal treatment to that afforded the other student clubs and organizations was all these students desired. (J.A. 105, 109). Yet the School Officials would not even allow the students at WHS to meet informally on a regular basis. (J.A. 431-34, 451-54).

2. The Club System at Westside High School Constitutes an Open Public Forum.

The WHS Club System constitutes an open forum. This Court has identified three types of public forums: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Board of Airport*

Commissioners v. Jews for Jesus, 482 U.S. 569 (1987). Over thirty clubs and organizations exist at WHS. By policy and practice, School Officials at WHS have "created a forum generally open for use by student groups." *Widmar*, 454 U.S. at 267.

School Officials have not established any compelling state interest to justify their complete prohibition of the Bible Club. *Carey v. Brown*, 447 U.S. 455, 461 (1980); *Widmar*, 454 U.S. at 270. Their reliance on the Establishment Clause as a "compelling interest" was specifically rejected by this Court in *Widmar*. The School Officials' hostility toward the students' religious speech "show[s] a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Rather than utilizing narrowly drawn regulations employing the least restrictive means, School Officials have implemented a ban "that broadly stifle[s] fundamental liberties." *Shelton v. Tucker*, 364 U.S. 479 (1960).

3. The School Officials' Ban Is An Unconstitutional Prior Restraint.

The sweeping ban of the Bible Club is an unconstitutional prior restraint on the students' freedoms of speech and association. School Officials exercised the sort of official discretion that this Court will not tolerate. *Houston v. Hill*, 482 U.S. 451 (1987). Further, the School Officials' application of unwritten guidelines, coupled with their broad-based and open-ended view of "curriculum related," constitute vague policies in violation of the Due Process Clause of the Fourteenth Amendment. *New York v. Ferber*, 458 U.S. 747 (1985).

4. The Equal Access Act Is Constitutional.

The School Officials' ban of the student-initiated Bible Club is in violation of the Equal Access Act (EAA). The EAA became law in 1984. Under the EAA, public secondary schools that received federal financial assistance are required to grant equal access to their facilities for students wishing to meet for religious, political or philosophical purposes when the school has a limited public forum. 20 U.S.C. § 4071(a). Congress passed the EAA

to end confusion among school administrators by applying *Widmar* to public high schools, thereby insuring that public schools "not discriminate against speech based on its content." 130 Cong. Rec. S8332 (daily ed. June 27, 1984).

A public secondary school triggers the EAA "whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during non-instructional time." 20 U.S.C. § 4071(b). Over thirty student clubs and organizations meet and use WHS facilities after school hours. (J.A. 231, 479-87). The eighth circuit correctly noted that many noncurriculum-related clubs meet at WHS. *Mergens*, 867 F.2d at 1079. In fact, Dr. Findley, the WHS principal, admitted that the Peer Advocates Club is noncurriculum related. (J.A. 231). Furthermore, Interact, an affiliate of Rotary International which is imbued with moral philosophy, exists at WHS. Subsurfers Scuba Club, which is supervised by non-school personnel, is another noncurriculum club in existence at WHS. Dr. Sybouts, a curriculum expert, reviewed the EAA and its legislative history. Based on this review, Dr. Sybouts found that WHS had one or more noncurriculum-related clubs and therefore the EAA was triggered. (J.A. 412). 20 U.S.C. § 4071(b).

The EAA does not violate the Establishment Clause. The application of the three-part test enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), confirms the constitutionality of the EAA. The creation of a forum for student speech, including religious speech, constitutes a legitimate secular purpose. *Widmar, supra*. Likewise, a policy of equal access "does not confer any imprimatur of state approval on religious sects or practices." *Texas Monthly v. Bullock*, 489 U.S. ___, 109 S.Ct. 890 (1989). Over thirty student clubs and organizations are in existence at WHS. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274. By allowing a policy of equal access, School Officials will not be "making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. ___, 109 S.Ct. 3086 (1989).

The argument that high school students are more impressionable than college students was properly rejected by Congress, the District Court and the Eighth Circuit Court of Appeals. In short, a policy of equal access does not have the primary effect of advancing religion.

Finally, permitting a voluntary, student-initiated Bible club to meet during noninstructional time does not foster an excessive government entanglement with religion. In fact, enforcing a ban against religion at WHS would prove to be far more entangling than a neutral policy of equal access. *Widmar* at 272 n.11.

ARGUMENT

I. THE SCHOOL OFFICIALS' BAN OF A VOLUNTARY, STUDENT-INITIATED BIBLE CLUB IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE STUDENTS' FREE SPEECH RIGHTS AS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. Public High School Students Have First Amendment Rights of Freedom of Speech and Freedom of Association.

The high school students at WHS who desired to form a voluntary student initiated Bible Club to meet on campus did not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).[8] As proposed to School Officials, the Bible Club meetings would have included Bible study, prayer and discussions of relevant topics in an effort to encourage personal and spiritual growth. (J.A. 73-77, 154-55, 185, 190). The Club would have met in "any empty classroom" either before the commencement of the required school day or after the completion of the school day. (J.A. 78, 117). The student-initiated

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[8] "This has been the unmistakable holding of this Court for almost 50 years." *Tinker*, 393 U.S. at 506; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Bible Club simply desired the same rights, privileges, terms and conditions as the other clubs at WHS. (J.A. 75, 131, 163). *See* note 2, *supra*.

The School Officials' prohibition cannot be sustained since there has been "no finding and no showing that engaging in the [Bible Club] would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (*quoting Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). To the contrary, even the school administrators testified at trial that the Bible Club would be in accord with the goals and missions of the school. (J.A. 234, 254). Notwithstanding the obvious compatibility of the Bible Club's purpose and the school's goals, the students' request was flatly and unequivocally denied.

It was the *content* of the speech in *Tinker* to which the school board objected, and, likewise, it is the *content* of the students' speech in the present case, to which School Officials now object.[9] Yet,

> [i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may

[9] Professor Laurence Tribe noted that, for constitutional purposes, the speech in *Tinker* was indistinguishable from a student-initiated Bible study. "No conceivable principal of distinction can suggest that students who have a right to wear arm bands to protest the war suddenly lose that right if they utter the name of God in the process, or if, heaven forbid, they should do it as a group instead of single file." *Religious Speech Protection Act: Hearing on H.R. 4996 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2nd Sess. 47 (1984).

> not be confined to the expression of those sentiments that are officially approved.[10]

Tinker, 393 U.S. at 511.

Students who seek to form the Bible Club acknowledge that the School Officials have "important, delicate and highly discretionary functions" to perform. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). These functions, however, must be performed "within the limits of the Bill of Rights."[11] *Barnette, Id.* at 637. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). By forbidding the Bible Club to meet, the School Officials exercised "authoritative selection" violative of the well-established principle that the "classroom is peculiarly the marketplace of ideas." *Keyishian*, 385 U.S. at 603.

This Court has recognized that "personal intercommunication among the students" in high school is an activity to which schools are dedicated. *Tinker*, 393 U.S. at 512. The

[10] In fact, official approval is exactly what School Officials require. In his affidavit submitted at trial, James E. Findley, Principal of WHS, testified "[t]hat in the event any one or more of the student clubs or organizations are determined by the Court to be noncurriculum related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, *I would recommend to the administration and Board of Education that it consider amending the policies to discontinue such student clubs or organizations.*" (J.A. 472) (emphasis added).

[11] *See also, Board of Education v. Pico*, 457 U.S. 853 (1982). Public schools "are educating the young for citizenship [which] is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitutes." *Barnette*, 319 U.S. at 637.

WHS students desired to meet together before or after regular school hours. The right of these students to meet, does "not embrace merely the classroom hours." *Id.* The School Officials' prohibition against the Bible Club violates the students' rights of freedom of speech and freedom of association.[12]

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 180 (1972). The School Officials have denied a fundamental constitutional right to the WHS students who seek to form a Bible Club. The students wanted treatment equal to that afforded other WHS clubs, nothing more. (J.A. 105, 109). Rather than provide equal treatment, School Officials, in an attempt to circumvent constitutional mandates, allegedly would have allowed the Bible Club to meet "informally" or off campus at a nearby church.[13] (J.A. 81, 83; Pet. Brief at 7). These identical contentions were raised by the school officials in *Healy* and rejected by this Court.

In *Healy*, school officials asserted that students desiring to form a local chapter of Students for a Democratic Society (SDS) could "meet as a group off campus . . . and that they still may meet together *informally* on campus – as individuals, but not as CCSC-SDS." 408 U.S. at 182 (emphasis added).

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[12] Those rights are protected by the First Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the belief sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (citations omitted) (emphasis added).

[13] In fact, "informal" meetings held on campus on a regular basis would *not* have been allowed. (J.A. 431-434, 451-454).

Rejecting the school officials' proposition, this Court held that "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities" imposed by the campus ban.[14] *Id.*

Similarly, the denial of official recognition burdens and abridges the freedom of association.[15] "The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes." *Healy*, 408 U.S. at 181. The "associational interests" of students desiring to form the Bible Club "were circumscribed by the denial of the use of campus bulletin boards and the school newspaper." *Id.* These "impediments cannot be viewed as insubstantial." *Id.* at 182. The freedom of association is "protected not only against heavy handed frontal attack, but also from being shifted by a more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516 (1960).[16]

Recently this Court revisited issues of student free speech rights in the public high school environment. In *Hazelwood School District v. Kuhlmeir*, 484 U.S. ___, 108 S.Ct. 562 (1988), the Court reaffirmed the *Tinker* test for regulations of

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[14] This Court, in *Schneider v. State*, 308 U.S. 147, 163 (1939), held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

[15] There is a distinction between recognition and sponsorship. In Webster's Third New International Dictionary (1967), "recognition" is defined, in pertinent part, as "acceptance of an individual as being entitled to consideration or attention." *Id.* at 1896. "Sponsorship" is defined as "the state of being a sponsor; [the] act of sponsoring; *official or financial support.*" *Id.* at 2204 (emphasis added).

[16] As discussed *infra* at III B, Petitioners' justification for banning the Bible Club is based on concerns of an Establishment Clause violation. As discussed more fully below, a policy of equal access does not violate the Establishment Clause. Furthermore, it is the School Officials who have failed to meet the "heavy burden" necessary to demonstrate the appropriateness of their actions.

student-initiated speech.[17] While, in *Hazelwood*, this Court allowed school officials to edit and eliminate student-written stories from the high school newspaper, the Court unequivocally stated that the issues in *Hazelwood* were distinct from those presented in *Tinker*.

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that the students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.

Hazelwood, 484 U.S. at ___, 108 S.Ct. at 569.

The student-initiated, voluntary Bible Club at WHS would not be deemed "school sponsored" within the meaning of *Hazelwood*. In *Hazelwood*, the school paper

> Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

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[17] The *Tinker* test may be summarized as follows: Absent a showing that the speech activity would "materially and substantially interfere with the requirements of appropriate discipline" or would interfere with the rights of others, prohibition of the speech activity would be inappropriate. *Tinker*, 393 U.S. at 513. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court again reaffirmed the principles enunciated in *Tinker*. In *Bethel*, the Court approved the school's actions in punishing a student for a nominating speech filled with lewd remarks and sexual innuendos. The speech was given at a *school assembly – a school-sponsored forum*. *Id.* at 677.

> The Board of Education allocated funds from its annual budget for the printing of Spectrum.

Id. at ___, 108 S.Ct. at 565.

Furthermore, "Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course." *Id.* at ___, 108 S.Ct. at 568.

These factors, indicating school sponsorship, are absent from the present case.[18] The Bible Club would have been voluntary, and it would have met after school. No credit or grade would have been received for participation. (J.A. 72, 78, 117). Furthermore, School Officials have no "legitimate, pedogogical concerns" with regard to the Bible Club. In fact, of the over 30 clubs and organizations at WHS, participation in only three of them could have any effect on a student's grade.[19]

The School Officials' sponsorship argument presents a "Catch 22" situation for the students. They argue that students can meet "informally" for religious discussions but that informal meetings conducted on a regular basis will not be allowed. (J.A. 431, 434, 451-454). The School Officials fault the students for requesting permission to meet on an equal basis with other student clubs; and they claim they did not request a faculty sponsor as required by Policy 5610. (J.A. 59, Pretrial Order Stipulation No. 13). School Officials further contend that the presence of a faculty sponsor at a Bible Club meeting would violate the Establishment Clause. Ultimately, the Bible Club is denied the right to meet either informally on a regular basis or formally at all. Thus, the School Officials' reasoning for the denial of access for students wishing to

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[18] Far from being taught by a faculty member, many "faculty sponsors" for WHS clubs frequently missed the meetings. (J.A. 92, 182, 247).

[19] Participation in Band, Choir and Drama can affect course grade. Each of these clubs, however, constitute activities that are part of the regular curriculum or activities that are extensions of secular academic classes. (J.A. 479, 483).

form a Bible Club, is merely a pretextual justification for discriminating against religious beliefs and speech.[20]

This Court has reaffirmed the duty of federal courts "to apply the First Amendment's mandates in our educational system" in order "to safeguard the fundamental values of freedom of speech and inquiry. . . ." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "[B]asic constitutional values" are "directly and sharply" implicated in this case by the School Officials' ban of the student-initiated Bible Club. *Pico*, 457 U.S. at 866 (*quoting Epperson*, 393 U.S. at 104).[21] The student-initiated, voluntary Bible Club would not have "materially or substantially" disrupted the educational process, therefore, the School Officials' prohibition violates the students' free speech, free exercise and freedom of association rights protected by the First and Fourteenth Amendments. *Tinker*, 393 U.S. at 513.[22]

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[20] Christian fellowship, Bible reading, worship and prayer are a vital part of the daily lives of these students. (J.A. 75, 131, 163). In addition to the violation of the students' rights of freedom of speech and association, the School Officials' prohibition of the voluntary, student-led Bible Club violates the free exercise clause of the First Amendment. School Officials have denied a "benefit because of the conduct mandated by religious belief." *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981).

[21] *See also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983); Note, *Religious Expression on the Public School Forum: The High School Students' Right to Free Speech*, 72 Geo. L.J. 135 (1983).

[22] This Court can affirm the opinion of the United States Court of Appeals for the Eighth Circuit without reaching the constitutionality of the EAA or the applicability of the open forum doctrine. The constitutional rights of students to freedom of speech and freedom of association as set forth in *Tinker* and *Healy*, are independent of the EAA or the open forum doctrine.

1. Religious Discussion and Worship Are Forms of Speech Protected By the First Amendment.

As proposed to school officials, the Bible Club meetings would have included Bible study, prayer, and discussions of relevant topics in an effort to encourage personal and spiritual growth. (J.A. 73-77, 154-155, 185, 190). Identical speech was at issue in *Widmar*, 454 U.S. 263. A "typical Cornerstone meeting included prayer, hymns, Bible commentary and discussion of religious views and experiences." *Widmar*, 454 U.S. at 266 n.2. It is a constitutional axiom that the kinds of speech proposed for the student-initiated Bible Club, consisting of religious worship and discussion, "are forms of speech and association protected by the First Amendment." *Widmar*, 454 U.S. at 269.[23]

B. The Club System at Westside High School Is A Public Forum From Which A Voluntary, Student-Initiated Bible Club May Not Be Banned.

1. The Club and Organization System at Westside High School Constitutes An Open Public Forum.

The club and organization system in place at WHS constitutes an open public forum. "In balancing the government interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, the Court has identified three types of forum: the traditional public forum, the public forum created by government designation and the nonpublic forum." *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

An open forum consists of public property which the State has opened for use by the public, "or by some segment of the public, such as student organizations," as a place for expressive activity. *Hazelwood*, 484 U.S. at ___, 108 S.Ct. at

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[23] *See, e.g, Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemetko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Schneider*, 308 U.S. 147; *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

568. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Perry Education Assn. v. Perry Local Educational Assn.*, 460 U.S. 37, 45 (1983). Undeniably, WHS School Officials created a student activities forum. As in many other cases decided by this Court,[24] exclusions from a forum, "come[] to this Court bearing a heavy presumption against [their] constitutional validity." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558 (1975). School Officials have failed to overcome that heavy presumption.

The *Widmar* decision controls the issues presented herein. The University of Missouri at Kansas City encouraged the activities of student organizations as its stated policy. Similarly, WHS School Officials "regard student clubs and organizations as a vital part of the education program." (J.A. 488). In *Widmar*, the University recognized over 100 student groups. Likewise, WHS School Officials recognized over 30 clubs and student organizations. Despite its stated policy, the University would not allow "Cornerstone" to meet on campus because a regulation prohibited the use of university grounds for religious teaching or worship. Likewise, WHS School Officials banned the student-initiated Bible Club because the content of the students' speech would have been "religious."

In *Widmar*, this Court held that the university's prohibition was unconstitutional. The facts of the present case dictate the same result reached in *Widmar*. "Through its policy of accommodating their meetings, [the School Officials have] created a forum generally open for use by student groups. Having done so, [the School Officials have] assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. In *Widmar*, the University could not justify its exclusion of religious speech from the University forum. In the present

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[24] *See, e.g., Schneider, supra; Lovell, supra; Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

case, the School Officials have similarly failed to justify their policy of excluding religious speech.

2. The School Officials' Content-Based Ban Is Not Justified By a Compelling State Interest.

a. The School Officials' Ban is Content Based.

The School Officials' ban of the student-initiated Bible Club cannot be constitutionally justified.

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [School Officials] must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest *and* that it is narrowly drawn to achieve that end.

Widmar, 454 U.S. at 269-70 (emphasis added); *Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980).[25]

There is no question that the Bible Club ban is a content-based response to the students' intended speech. (J.A. 81, 313). Dr. Findley testified at trial that it was the Christianity of the club that prompted his decision. (J.A. 312). This Court defines content-neutral speech restrictions as "those that are justified without reference to the content of the regulated speech." *Boos v. Barry*, 485 U.S. ___, ___, 108 S.Ct. 1157,

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[25] The least restrictive alternative test must be applied to this case because content-based bans "must be subjected to the most exacting scrutiny." *Ward v. Rock against Racism*, 491 U.S. ___, ___, 109 S.Ct. 2746, ___ (1989). The least restrictive alternative test must be applied here because of Respondents' asserted claims of injury to their rights of free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Petitioners content-based prohibition "is not narrowly tailored; a less restrictive alternative is readily available." *Boos*, 485 U.S. at ___, 108 S.Ct. at 1168.

1163 (1988) (citations omitted). Here, it was solely the *content* of the students' speech that was the basis for the implementation of the ban on the student-initiated Bible Club.[26]

b. The School Officials Have Not Shown a Compelling State Interest.

School Officials have failed to establish a compelling interest justifying the sweeping ban of the Bible Club. Their reliance upon the Establishment Clause as a "compelling interest" was specifically rejected by the *Widmar* Court.[27] While this Court agreed "that the interest of the University in complying with its constitutional obligations may be characterized as compelling[,] *[i]t does not follow, however, that an "equal access" policy would be incompatible with this*

[26] Stressing its disdain for content-based prohibitions, this Court has said:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." [*New York Times Co. v. Sullivan*, 376 U.S. at 270].

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972).

Content-based regulation of speech constitutes "censorship in a most odious form" and violates the First Amendment. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). Education is a proper and preferable alternative to censorship. *Whitney v. California*, 274 U.S. 357 (1927). Content-based discrimination also constitutes a violation of Equal Protection through the Fifth Amendment. *Wayte v. United States*, 470 U.S. 586, 608 n.9 (1985).

[27] For an analysis of the Establishment Clause under the three-prong test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), see section III B, *infra*.

Court's Establishment Clause Cases."[28] *Widmar*, 454 U.S. at 271 (emphasis added).

Voluntary, student-initiated, student-led religious activity on public school property has never been prohibited by this Court. Indeed, this Court's interpretation of the Establishment Clause has required that school officials accommodate the needs of students with religious convictions. *See, e.g., Yoder*, 406 U.S. 205.

Sound constitutional distinctions may be made between a State-initiated religious activity, in which students choose whether or not to participate and a voluntary, student-initiated religious activity that school officials simply permit under a neutral policy of equal access allowing students to meet to discuss their various interests. Markedly different from a voluntary, student-initiated Bible Club are state statutes *requiring* posting of the Ten Commandments in public classroom walls, *Stone v. Graham*, 449 U.S. 39 (1980), state laws *requiring* daily Bible reading and recitation of the Lord's Prayer in public classrooms, *School District v. Schempp*, 374 U.S. 203 (1963), state statutes *requiring* recitation of a State-composed prayer in the public classroom, *Engel v. Vitale*, 370 U.S. 421 (1962), and state statutes *requiring* teachers that teach evolution to also teach creation, *Edwards v. Aguillard*, 482 U.S. 578 (1987).

[28] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., amend. I. The Establishment Clause is applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Petitioners have also asserted that they have met the compelling state interest test because the Bible Club would not have presented a "balanced view" (Pet. Brief at 44). Rather than justifying their ban in light of this Court's precedent, Petitioners rely upon a heretofore unheard of theory of law requiring the presentation of a "balanced view" when controversial subjects are discussed at WHS. Presenting a balanced view does not constitute a compelling interest. This Court examines, with the highest degree of scrutiny, regulations that infringe on constitutional rights. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

The Establishment Clause was designed to prevent government from exercising jurisdiction over matters of religion. The Establishment Clause does not address or affect rights of communication between individuals. As Justice Brennan wrote in his concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978), "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Yet, the School Officials have treated the students desiring to form the Bible Club at WHS as "subversives." Dr. Findley, the Principal at WHS, testified that if the Court deems WHS a public forum, he would "recommend to the administration and the Board of Education that it consider amending the policies to discontinue such student clubs or organizations." (J.A. 472).

The School Officials' hostility toward the students' religious speech "show[s] a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).[29] This Court has recognized that the "Establishment Clause mandates state neutrality, not *hostility*, toward religion."[30] *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 554 (1986). (Burger, C.J. dissenting) (emphasis added).

The Free Speech Clause and the Establishment Clause do not conflict.

> [T]he First Amendment require[s] vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by

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[29] In fact, Respondent Andrea Dawn Simmonds testified that when school officials denied the Bible Club the right to meet, she felt that she was discriminated against on the basis of her religious beliefs. (Tr. 100).

[30] In *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), Justice Black, writing for the Court, stated that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than to favor them."

> the Free Exercise and Free Speech Clauses of the First Amendment.

Bender, 475 U.S. at 553.

Equal access to public high schools for all lawful groups who are entitled to be there is precisely the ideal and vision of the Founding Fathers. To exclude a student-initiated, student-led Bible Club from the WHS club forum offends the very core of the First Amendment. *Widmar, supra; Niemetko, supra*. A policy of equal access at WHS would not *endorse* religion, nor *promote* it, nor would it *coerce* participation. Over 30 clubs and organizations are in existence at WHS. By following a policy of equal access, School Officials will not be "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. ___, 109 S.Ct. 3086 (1989). In sum, an equal access policy does not constitute a violation of the Establishment Clause of the First Amendment. *See generally*, Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986).

3. The School Officials' Ban Is Not Narrowly Tailored.

The absolute ban of a student-initiated Bible Club from the WHS campus is not "narrowly drawn" nor does it utilize "least restrictive alternatives" as is required to meet constitutional standards. *Widmar, supra; Carey, supra; Boos, supra; Ward, supra; Shelton, supra*. "[B]ecause First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). "Precision of regulation must be the touchstone" in regulating free speech. *Id.* at 438.

Rather than implementing narrowly drawn regulations, School Officials implemented a ban "that broadly stifle[s] fundamental personal liberties when the end can be more narrowly achieved." *Shelton*, 364 U.S. at 252. Many less restrictive alternatives exist which would accommodate the School Officials' concern. The students would have been

willing to allow School Officials to post disclaimers in order to convey state neutrality to the student population. (J.A. 72).[31] Yet School Officials did not even consider these least restrictive means. (J.A. 73). These same School Officials must teach the meaning of the Bill of Rights to students, not only by *words*, but by *action*. *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). Instead of complying with the applicable constitutional requirements, however, School Officials created a "First Amendment Free Zone" at WHS with regard to the Bible Club. *Jews for Jesus*, 482 U.S. at 574.

C. The School Officials' Ban of a Student-Initiated Bible Club is Unconstitutional Because It Is An Effort To Suppress Expression Merely Because They Oppose the Students' Viewpoints.

The School Officials' ban of a student-initiated Bible club would be unconstitutional even in a nonpublic forum because it is an, "effort to suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 46 (1983). Just as a ban may be void regardless of the nature of the forum on overbreadth grounds, *Bd. of Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), so too, the School Officials' ban is void regardless of the nature of the forum because it is, "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius v. N.A.A.C.P. Legal Defense & Ed. Fund*, 473 U.S. 788, 812-13 (1985).

Although the School Officials may prefer the discussion of "some subjects over others," they have intentionally, albeit impermissibly, engaged in blatant viewpoint discrimination. Principal Findley so desires to suppress the students' world view that he would rather, "discontinue such student clubs or

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[31] In fact, at trial, Bridget Mergens testified that if the School Officials wanted to make a disclaimer announcement in the school paper or through the P.A. system, "that would have been fine with me, sir." (J.A. 73)

organizations," than permit the students to study the teachings of the Bible in a student-initiated Bible Club. (J.A. 472).

In contrast, the teachings of the viewpoint of Interact, a student affiliate of the Rotary Club International, receives official sponsorship under the school's own view of "sponsorship." Instead of a Ten Commandments, Interact employs the 4-Way Test. The 4-Way Test is:

1. Is it the TRUTH?
2. Is it FAIR to all concerned?
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?

Rotary International, The 4-Way Test Of The Things We Think, Say Or Do (Rotary International, Evanston, Illinois).

This admirable guiding ethic is considered by Rotarians to be the catalyst for "a great improvement in moral character" for its adherents. *Id.* at 9.

Justice Stevens has previously addressed the impermissibility of inconsistent approaches to doctrinally-related school clubs:

> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted. The fact that their expression of faith includes ceremonial conduct is not, in my opinion, a sufficient reason for suppressing their discussion entirely.

Widmar v. Vincent, 454 U.S. 263, 281 (1981) (Stevens, J., concurring).

Assuming, *arguendo*, the validity and reasonableness of the school's justifications for banning the club, "those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view." *Cornelius*, 473 U.S. at 812. Under the school's view, the Establishment

Clause prohibits a Bible club because the school sponsors clubs, yet they simultaneously sponsor the viewpoint of Rotary International through the Interact Club. The school's ban therefore is void, regardless of the nature of the forum, because School Officials admit that they have acted, "with the intent of promoting a particular point of view in religious matters," *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

D. The School Officials' Ban of the Bible Club Is Not A Reasonable Time, Place and Manner Regulation.

Reasonable time, place and manner restrictions, not sweeping prohibitions, are the means by which School Officials may control access to a public forum. Such restrictions must be content neutral and "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45. Insofar as the School Officials' policy bans the Bible Club from WHS, it offends the First Amendment for it is neither a reasonable time, place and manner restriction nor is it narrowly drawn to serve a significant government interest.[32] The prohibition of the Bible Club at WHS is the type of "sweeping ban" that this Court has consistently condemned.[33]

As an attempt to "save" the constitutionality of the prohibition, School Officials asserted that the Bible Club could

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[32] As set forth fully *supra*, the School Officials' ban of the Bible Club is not content neutral. (J.A. 255).

[33] *United States v. Grace*, 461 U.S. 171 (1983) (a total ban on display of "flags, banners, or devices" on the sidewalk surrounding the Supreme Court is unconstitutional); *Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980) ("measures less intrusive than a *direct prohibition* on solicitation" can be instituted to prevent fraudulent misrepresentation); *Frisby v. Schultz*, 487 U.S. ___, 108 S.Ct. 2495 (1988) (picketing in front of a single residence may be prohibited, *but not* general marching through a residential neighborhood). *See also Heffron, supra*, (free speech activities allowed; solicitation on fairgrounds,

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meet in a church across the street from the school. This self-serving gesture cannot be countenanced. Relegating students otherwise entitled to participate in the club system forum has the effect of "stamping" Bible Club participants with "a badge of inferiority." *Plessy v. Ferguson*, 163 U.S. 537 (1896). The time is long past when School Officials may satisfy the Equal Protection Clause by providing separate but equal facilities. *Brown v. Board of Education*, 347 U.S. 483 (1954). Finally, as this Court recognized over fifty years ago, "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163.

II. THE BAN OF A STUDENT-INITIATED BIBLE CLUB CONSTITUTES A VIOLATION OF THE STUDENTS' DUE PROCESS RIGHT BECAUSE OF THE LACK OF OBJECTIVE STANDARDS AND PROCEDURAL SAFEGUARDS WHICH RESULTED IN THE SCHOOL OFFICIALS' EXERCISE OF ARBITRARY DISCRETION.

A. The School Officials Exercised Impermissible Discretion.

The School Officials' ban of the student-initiated Bible Club is an unconstitutional prior restraint on the students' freedoms of speech and association. Many times this Court has held that arbitrary official discretion to permit or forbid First Amendment activities constitutes an impermissible prior restraint. *Niemotko*, 340 U.S. at 271. Even a cursory review of the facts of this case establishes that the WHS School

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however, required to be conducted from booths to ensure orderly movement of crowds). By enacting reasonable time, place and manner restrictions rather than flat prohibitions, free speech will not be stifled at its source. *Kovacs v. Cooper*, 336 U.S. 7 (1949) (prohibiting *only* those "sound trucks that emit loud and raucous noise"); *Grayned*, 408 U.S. 104 (prohibiting only those demonstrations that disrupt normal activities).

Officials exercised the type of unbridled discretion "to grant or withhold [permission] upon a broad criteria unrelated to the proper regulation of public places" that this Court has consistently condemned. *Id.* at 294; *accord, Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Westside School District, like the University in *Widmar*, has applied a policy favorably toward non-religious student groups while applying the same policy in an invidiously discriminatory manner against religious student groups. Dr. Findley, the WHS Principal, testified that he and Mr. Huston are responsible for evaluating student requests for the creation of student organizations. (J.A. 241). He testified that there was *no written procedure* for assessment of student requests (J.A. 241), only the unwritten, customary procedure that has evolved over the years. (J.A. 241). The *unwritten policy* requires Dr. Findley and Mr. Huston to assess each student request by determining the goals and objectives of the club (J.A. 358, 359), and by meeting with potential sponsors to "see whether or not it fits under our guidelines and our Board Policy." (J.A. 359). Only after such an investigation would the administrators make the decision whether to approve or deny the club. (J.A. 241).

Bridget Mergens' request for a Bible Club was treated differently. When she made her first request to Dr. Findley, it was immediately denied. (J.A. 72). Mr. Huston was told about the request only after it had already been denied by Dr. Findley. Mr. Huston testified that Dr. Findley told him that someone had requested the formation of a Bible Club. (Tr. 512:17-22). Mr. Huston stated he had no input at all into the decision-making process for denial of the club. (J.A. 361). Furthermore, Dr. Findley had already told Mr. Huston that it was his opinion that the Bible Club could not meet. (J.A. 254).

Dr. Findley did not review school policy before the denial (J.A. 256, 257), nor did he seek a legal opinion before denial, despite the fact that the students requested that their club meet under the guidelines of the EAA. (J.A. 87). The denial was based on Dr. Findley's own interpretation of the Act (J.A. 244, 246), and "the fact that it appeared to me that it

was advocating a religious viewpoint instead of giving a study of a religion. . . ." (J.A. 246). Dr. Findley denied access to the proposed club, because he felt that it violated the missions and goals of WHS in that the Club would not "give both sides." (J.A. 254). He then admitted that he had made an "*assumption*" with regard to the students' request (J.A. 255), and finally stated that a Bible Club could meet the missions and goals requirements of WHS. (J.A. 256).

The student Bible Club at WHS was denied access under an *oral* policy which was applied in an invidiously discriminatory and unequal manner. The administration failed to abide by its own policy and exercised unfettered discretion in violation of the First Amendment and Equal Protection Clause.[34]

The School Officials' standardless policy provides the "opportunity for abuse, especially where a [policy] has received a virtual open-ended interpretation" in violation of this Court's many precedents. *Lewis v. City of New Orleans*, 430 U.S. 130, 135-36 (1974) (Powell, J., concurring). *See also Houston v. Hill*, 482 U.S. 451 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983). School Officials must not be allowed to continue to hold and exercise the sort of official discretion that this Court refuses to tolerate.

B. The School Officials' Ban of the Student-Initiated Bible Club Is Vague.

The School Officials' "unwritten guidelines", coupled with their broad-based and open ended view of "curriculum related," constitute vague policies in violation of the Due Process Clause of the Fourteenth Amendment. These "policies" embody both offensive aspects under the vagueness doctrine:

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[34] This proscription violates the Equal Protection Clause of the Fourteenth Amendment. It singles out religious clubs as a suspect class and deprives that class of benefits accorded to all other WHS student clubs and organizations. *See Police Department v. Mosley*, 408 U.S. 92, 102 (1972).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). . . . This Court has recognized that "a sweeping statute or one incapable of limitation has the potential to repeatedly chill the exercise of expressive activity by many individuals . . . ."

New York v. Ferber, 458 U.S. 747, 772 (1985).

At trial, Dr. Findley admitted that he made an "assumption" with regard to the proposed Bible Club. He employed "unwritten policy", and there was no "written procedure" for assessment of students' requests, according to his trial testimony. Finally, all the recognized clubs were, in Dr. Findley's opinion, "curriculum related." This vagueness produces a chilling effect in violation of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 76-82 (1979); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1974). The Eighth Circuit Court of Appeals condemned the application of "curriculum related" as proposed by the School Officials:

> Allowing such a broad interpretation of "curriculum related" would make the Equal Access Act meaningless. A school's administration could simply declare that it maintains a closed forum and then choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time, the administration could arbitrarily deny access to

> school facilities to any unfavored student club *on the basis of its speech content. . . . .A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.*

Mergens, 867 F.2d at 1078 (emphasis added).

The line between the School Officials' opinion of curriculum-related clubs "is, at best, murky," and therefore the application of the policies are void for vagueness. *Jews for Jesus, supra.*

III. THE EQUAL ACCESS ACT IS CONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The School Official's Ban of the WHS student initiated Bible Club was a violation of the Equal Access Act. The Equal Access Act requires a public secondary school receiving federal financial assistance to grant equal access to its facilities for students wishing to meet for *religious, political* or *philosophical* purposes when the school has a limited public forum.[35] 20 U.S.C. § 4071(a) (1984). According to the sponsors of the Act, it was necessary for Congress to end confusion among school administrators by applying the

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[35] The EAA was passed by overwhelmingly bipartisan majorities in the House of Representatives (377-73) (130 Cong. Rec. H7740-41 (daily ed. July 25, 1984)), and the Senate (88-11) (130 Cong. Rec. S8370 (daily ed. June 27, 1984)). Its supporters cited the need to end discrimination and hostility toward students desiring to voluntarily associate themselves together in common interest for religious discussion. *See* 130 Cong. Rec. S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *see also id.* at S8331-332 (statement of Sen. Hatch); *id.* at S8355 (statement of Sen. Levin); *id.*, at S8365 (statement of Sen. Baucus); 130 Cong. Rec. H7730 (daily ed. July 25, 1984) (statement of Rep. Nielson); *id.* at H7734 (statement of Rep. McEwen). "Equal Access will go a long way toward ending the official hostility that has come to dominate the Government's attitude toward the free and voluntary practice of religious beliefs." *Id.* at H7737 (statement of Rep. Emerson).

principles enunciated in *Widmar*, to insure that "[g]overnment may not discriminate against speech based on its content." 130 Cong. Rec. S8332 (daily ed., June 27, 1984) (statement of Sen. Hatch); *id.* at S8358 (remarks of Sen. Durenburger).[36] The function of this Court in interpreting the EAA "is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Association*, 310 U.S. 534, 542 (1940). Simply stated, the EAA was enacted in part to eradicate invidious discrimination against student-initiated religious speech such as was perpetrated by the WHS School Officials.[37]

A. Westside High School Has Established a Limited Open Forum Under the Equal Access Act.

School Officials have created a limited open forum at WHS. In determining whether School Officials created a "limited open forum" under the EAA, the *policy* and *practice*

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[36] Sen. Denton stated that the EAA is designed to clarify that secondary school students "have the same rights to associate together and to speak, as do students who wish to meet to discuss chess, politics or philosophy." 130 Cong. Rec. S8335 (daily ed. June 27, 1984).

[37] Sen. Mark Hatfield, the primary sponsor of the EAA, in expressing his adamant opposition to the President's School Prayer Amendment stated:

> Instead of concentrating our attention on initiatives like a School Prayer Amendment, I would urge my colleagues to devote their energies to rooting out ridiculous barriers that have been enacted to forbid voluntary meetings of students who seek to meet and pray in non-disruptive ways.

128 Cong. Rec. S11781 (daily ed. Sept. 17, 1982) (printed remarks of Sen. Hatfield).

In fact, the majority of those who strongly opposed the prayer amendment expressed complete support for the Equal Access Act, and concern that, "[s]chools today are being hostile toward religion. Not neutral, but plainly antagonistic." 130 Cong. Rec. S8360 (daily ed. June 27, 1984) (statement of Sen. Mattingly); *see also id.* at S8340 (remarks of Sen. Leahy); *id.* at S8356 (remarks of Sen. Bumpus); *id.* at S8358 (remarks of Sen. Biden).

at the school is determinative. A public secondary school triggers the EAA "whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during non-instructional time." 20 U.S.C. § 4071(b). Approximately 30 student clubs and organizations meet and use the facilities of WHS after regular school hours. (J.A. 231, 479-87). Attendance at these clubs is voluntary, and they exist and function on the basis of student interest. (J.A. 276-277, 363-364). School Officials testified that clubs cease to exist when student interest wanes. (J.A. 276-77, 363-364). Participation in extracurricular activities is encouraged, and the administration entertains student suggestions for the formation of clubs. (J.A. 230-231, 240-241, 290-291, 358). Teachers play the role of custodial monitors and do not "instruct" in any sense, in the majority of these groups meetings.[38] (J.A. 92, 111-12, 123-24).

As the Eighth Circuit Court of Appeals held, many non-curriculum-related clubs meet at WHS. *Mergens*, 867 F.2d at

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[38] The Computer Club sponsor is not a member of the teaching faculty and was not present for "about a fourth" of the club meetings. (J.A. 182).

Bridget Mergens testified that the Drama Club was directed and run by the student officers and that the sponsor would "sometimes . . . come back and lock up after we were done." (J.A. 92). When asked about the proposed Bible Club, Bridget Mergens testified:

> Q. Who did you expect to direct the activities of the club?
>
> A. Students, simply like any other club that I was ever involved in that was not Choir. Other than Choir, all the arrangements were made by the students. It would simply be the same format as that.

(J.A. 112); *see also* J.A. 124 (Spanish Club directed by students).

The EAA provides for teacher sponsorship to the extent that they are present in a nonparticipatory capacity. 20 U.S.C. § 4071(c)(3) (1984). That section of the Act explains § 4071(c)(2) which would otherwise appear to permit schools to avoid equal access by requiring "sponsorship" of student meetings. The term "sponsorship" is defined by the Act in § 4072(2) and specifically provides that the assignment of a teacher "for custodial purposes does not constitute sponsorship of the meeting."

1078. During Senate debates, Sen. Hatfield stated that "curriculum related" meant the club or organization was an "extension of the classroom". 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).[39]

In order to determine the extent of the forum at WHS under the EAA, this Court must answer one fundamental question: *Are the recognized clubs and activities directly related to curriculum course work*? If not, the clubs are not

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[39] In Webster's Third New International Dictionary Unabridged, 1986, the word "curricular" is defined as, "of or relating to academic courses of study." The word "curriculum" is defined as:

> The whole body of courses offered by an educational institution or one of its branches. Any particular body of courses set for various majors (e.g., the curriculum in engineering)

Id. at 557.

The word "courses" is defined in that same volume as:

> An educational unit usually at the high school, college, or university level consisting of a series of instruction periods (as lectures, recitations, and laboratory sessions) dealing with a particular subject.
>
> A series of such courses coordinated to constitute a curriculum and leading typically to a degree.

Id. at 522.

In contrast, the word "extracurricular" (also "extracurriculum") is defined as:

> Outside a regular curriculum: not falling within the scope of a regular curriculum; specifically: of or relating to *officially or semiofficially* approved, and organized *student activities* (athletics, dramatics, or publication of a school newspaper) connected with the students' school and *usually carrying no academic credit.*

Id. at 806 (emphasis added).

The common and most recognized usage of the word reflects *direct application to academic courses* of study offered at a high school or university which are required in order to obtain a degree. With the exception of Drama Club, Band and Choir, the clubs at WHS are not academically oriented and are not required for high school graduation. (J.A. 479, 483).

"curriculum related" and the school has established a limited open forum under the EAA.[40]

Despite WHS School Officials attempt to broadly interpret "curriculum related" and rationalize the exclusion of the Bible Club, Dr. Findley conceded that Peer Advocates is noncurriculum related.

> Q. Did Peer Advocates, when you were looking at it, relate to any of the required curriculum or elective curriculum courses at Westside High School?
>
> A. No.

(J.A. 231).

Furthermore, Interact is a moral philosophic service club at WHS related to Rotary International. Interact operates in conformity with specified philosophical guiding principles of Rotary International. (J.A. 287-89). Rotarians attend Interact meetings and on occasion Interact members attend Rotary functions. (J.A. 299-300, 367-68). Interact, like all other WHS clubs is voluntary and is not required for class credit or graduation and is not directly related to curriculum course

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[40] Under Representative Goodling's test, a club is curriculum related only if the students who are in the club also attend the related class. 130 Cong. Rec. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

Sen. Dole stated that a club or activity is noncurricular if the meetings are "not directly related to the school's curriculum". 130 Cong. Rec. S8362 (daily ed. June 27, 1984).

Sen. Hatfield also posited that if the school permits students to initiate requests for the formation of clubs, they have established a limited open forum. 130 Cong. Rec. S8342 (daily ed. June 27, 1984).

Other legislators expressed the same principle in a slightly different manner: If a school permits "voluntary student groups," "student activities," or "student groups" to meet, it must permit voluntary student groups to engage in religious speech. 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (statement of Sen. Gorton).

work. (J.A. 226-28). Interact is a noncurriculum-related activity within the parameters of the EAA.[41]

The existence of a Chess Club at WHS triggers the EAA, as evidenced by the following debate:

> Mr. Gorton: I gather from the previous remarks of the Senator from Oregon and the Senator from Alabama that the definition of these non-related student groups is fairly broad. The Chess Club would be such a group. If the school permits a Chess Club, it has thereby created the limited open forum which brings into effect the proscriptions of the act.
>
> Mr. Hatfield: That is correct.

130 Cong. Rec. S8342 (daily ed. June 27, 1984) (colloquy of Sen. Hatfield and Sen. Gorton).

WHS has compiled a list of activities and has specifically defined such clubs as Band, Choir and Distributive Education as being "included in our regular curriculum", "offered as a part of the curriculum" and "this is an organization that is an extension of the Distributive Education class." (J.A. 479-87). Similar references are made to the Dramatics Club and Orchestra Club. (J.A. 479-87). The Chess Club is defined, however, as an activity "for those interested in chess"; Interact and Zonta are described by reference to nationally recognized service organizations. (J.A. 479, 481, 485). By virtue of these descriptions, WHS has identified those clubs which are either curriculum or noncurriculum related within its club system.

At trial, Dr. Ward Sybouts, a curriculum expert, testified that he had studied the EAA, EAA guidelines, legislative history and the WHS club system. He testified that, in his

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[41] "For many decades Rotary clubs and Rotarians around the world have used The 4-Way Test as an instrument to develop respect and understanding among peoples." Rotary International, The 4-Way Test Of The Things We Think, Say Or Do (Rotary International, Evanston, Illinois).

opinion, Congress had adopted a definition of curriculum that included only those student activities related to courses offered at the school. (J.A. 408). When asked to give his opinion about specific WHS clubs, Dr. Sybouts stated that Interact "would be non-curriculum[,]" (J.A. 410), and that Chess Club "would be more likely considered as a non-curriculum-related club." (J.A. 410). Similarly, Welcome to Westside "would be a service activity and probably not related to a course and therefore it would be non-curricular." (J.A. 411). Also, Dr. Sybouts testified that since WHS had no class in leadership, "student council or your student forum is non-curricular." (J.A. 412). In summary, after reviewing the Student Activities List (J.A. 479), Dr. Sybouts testified WHS had one or more non-curriculum-related clubs. (J.A. 412).

The evidence in this case fully supports the eighth circuit's finding that WHS has created a limited open forum under the EAA. The court of appeals correctly held that adopting the School Officials' view of the forum would permit them to "arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content." *Mergens*, 867 F.2d at 1078.

The School Official's interpretation of "curriculum related," as anything that remotely relates to the educational purpose and mission of WHS, violates the Act itself, as well as congressional intent. It is conceivable that any student group under such a definition would qualify as "educational," including the students proposed Bible Club.

As the Eighth Circuit correctly observed, "[a]llowing such a broad interpretation of 'curriculum-related' would make the EAA meaningless." *Mergens*, 867 F.2d at 1078. To define "noncurriculum related student group" in a way that allows schools to evade the Act by cleverly describing existing student groups is not faithful to Congress' intent to protect "extracurricular student speech." *See e.g.*, 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (colloquy of Sen. Hatfield and Sen. Gorton).

B. The Equal Access Act Does Not Violate the Establishment Clause of the First Amendment.

The Equal Access Act does not conflict with the Establishment Clause. In this case, the conflict is between the WHS students and the School Officials' incorrect view of the law. Wrongly, the School Officials assert, that equal treatment of voluntary, student-initiated religious speech in a high school setting operates to establish religion in violation of the First Amendment. A careful analysis of this Court's relevant precedents, however, establishes that a policy of equal access for student organizations does not violate the Establishment Clause. *Widmar, supra.*

In *Widmar,* this Court provided a framework for analyzing equal access issues consistent with this Court's earlier decision in *Lemon,* 403 U.S. at 612-13, noting that

> a[n equal access] policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.' "

Widmar, 454 U.S. at 263 (*quoting Lemon,* 403 U.S. at 612-13).[42]

In *Widmar,* this Court held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. *Widmar,* 454 U.S. at 271-72. With respect to the claim that allowing religious groups to share the forum would

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[42] The analysis of the three-part *Lemon* test is equally applicable to both a "policy and practice" of equal access and the Equal Access Act. This Court, however, has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *See Lynch,* 465 U.S. at 679; *Tilton v. Richardson,* 403 U.S. 672 (1971).

have the primary effect of advancing religion, this Court stated that the real question was whether the university, having opened its facilities for use by student groups, could "now exclude groups because of the content of their speech." *Id.* at 273. This Court concluded that the school could not do so without violating the students' First Amendment rights.

1. The Equal Access Act Has a Secular Legislative Purpose.

The plain language of the EAA proclaims a secular legislative purpose. The Act's purpose, as stated by its sponsors, was to end discrimination and confusion surrounding free speech and assembly rights of students. *Supra* fns. 35-37. Facially, the Act not only prohibits discrimination against religious meetings, but protects "political, philosophical or other content of the speech at such meetings" as well. Title 20 U.S.C. § 4071(a); 130 Cong. Rec. H7734 (daily ed. July 25, 1984) (statement of Rep. Smith of Nebraska).[43]

As this Court noted in *Widmar,* the creation of a forum for student speech, including religious speech, constitutes a legitimate secular purpose. That a policy of equal access touches on religious speech is no more violative of the *Lemon* test than is the inclusion of religious groups in any other public forum created for secular reasons. As Justice Scalia stated in *Aguillard,* in "all three cases in which we have struck down laws under the Establishment Clause for lack of a secular purpose, we found that the legislature's *sole* motive was to promote religion." *Aguillard,* 482 U.S. at 614 (Scalia,

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[43] This Court noted in *Aguillard,* 482 U.S. 578, that it "is normally deferential to a [governmental] articulation of a secular purpose . . . ." *Id.* at 586. In *Lynch,* 465 U.S. 668 (1984), this Court held that a *non-secular purpose* will not be inferred lightly.

J., dissenting) (emphasis added).[44] Both the EAA and an equal access policy meet the secular purpose prong of *Lemon*.

2. Equal Access Does Not Have the Primary Effect of Advancing Religion.

Allowing a voluntary, student-initiated Bible Club to meet at WHS does not have the primary effect of advancing religion. This Court rejected the claim that the extension of an open forum policy to student religious groups would have the impermissible primary effect of advancing religion. *Widmar*, 454 U.S. at 273-75. Acknowledging that it was "foreseeable" that religious groups would benefit from the open forum policy, this Court nevertheless held that any benefit would be "merely incidental" and therefore, would not constitute the advancement of religion under the Establishment Clause.[45]

Two factors were identified by the *Widmar* Court as especially relevant to its holding: first, the fact that an open forum policy "does not confer any imprimatur of State approval on religious sects or practices," and second, the fact that the forum was available to a broad class of speakers. *Widmar*, 454 U.S. at 274; *see also Texas Monthly v. Bullock*, 489 U.S. ___, 109 S.Ct. 890 (1989).

The endorsement inquiry "turns upon the context in which the contested object appears." Thus, "[e]very government practice must be judged in its unique circumstances to

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[44] *See also Lynch*, 465 U.S. at 680 (describing *Stone* and *Epperson* as cases in which this Court invalidated laws "motivated wholly by religious considerations").

[45] To this point, the *Widmar* Court noted several cases in which state action was held to be constitutional, despite benefits to religious organizations. *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976) (aid to institutions of higher education, including institutions affiliated with religious sects); *Hunt v. McNair*, 413 U.S. 734 (1973) (issuance of state revenue bonds for church-affiliated college); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws).

determine whether it [endorses] religion." *County of Allegheny*, 492 U.S. ___, ___, 109 S.Ct. 3086 (1989) (citing *Lynch*, 465 U.S. at 694). Over thirty student clubs and organizations are in existence at WHS, covering a wide range of student interests. In fact, WHS students are told that they can *initiate* and organize clubs. (J.A. 221-222). "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274; *Texas Monthly*, 489 U.S. at ___, 103 L.Ed. 2d at 14. With such a "broad spectrum" of student clubs and organizations at WHS, School Officials, by allowing the Bible Club to meet, would not be "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*."[46] *County of Allegheny*, 492 U.S. ___, 109 S.Ct. at 3101 (*quoting Wallace v. Jaffree*, 472 U.S. at 70).

The School Officials' argument that WHS students specifically, and secondary school students in general, are more impressionable than university students, and would view an accommodation of the Bible Club as endorsement of one religion over another is not valid. This assumption of impressionability was investigated in detail by Congress in its consideration of the EAA and was rejected.[47] After observing the

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[46] *See also Aguillard*, 482 U.S. at 593 ("*preference*" for particular religious beliefs constitutes an endorsement of religion); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no *favoritism* among sects or between religion and nonreligion").

[47] The Senate Judiciary Committee found it a false assumption "that students will *not* perceive a ban on all extracurricular religious speech as State hostility toward religion," and went on to find that "the clear message that the blackout of religious speech and ideas sends to students is that the State is hostile to religion." S.Rep. No. 357, 98th Cong., 2d Sess. 10, 19 (hereafter S.Rep. No. 357). Congress, in enacting the EAA, made explicit findings of fact in support of the legislation. "To the extent 'legislative facts' are relevant to a judicial determination, Congress is

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maturity and capabilities of the students who testified, as well as psychological information related to impressionability, the Senate Committee on the Judiciary found that "students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S.Rep. No. 357, *supra* fn. 50, at 35.[48]

In addition to legislative fact finding, the students presented expert testimony refuting the impressionability argument. Dr. David Moshman, a child psychologist, testified that students at the age of eleven or twelve have reached the final stage in the development of cognitive reasoning and are fully capable of understanding differences between state endorsed religious activity and student-initiated religious activity. (J.A. 390-391; 399). In fact, Dr. Moshman stated that by the time students reach age twelve, they are capable of understanding

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well equipped to investigate them, and such determinations are of course entitled to due respect." *Katzenbach v. Morgan*, 384 U.S. 641, 667 (1966). In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court held that those challenging legislative judgment must persuade the Court that legislators could not reasonably believe the facts on which they based their judgment. *Id.*, at 464. *See also Eastland v. United States Servicemen's Fund*, 221 U.S. 491 (1985) (the power to investigate is inherent in the power to legislate).

[48] For example, Bonnie Bailey testified before the Committee and said:

> We have been taught that the Constitution guarantees us freedom of speech. But we feel that here we have been discriminated against, because we can picket, we can demonstrate, we can curse, we can take God's name in vain, but we cannot voluntarily get together and talk about God on any part of our campus, inside or out of the school.
>
> We just feel frustrated because we don't feel like we are being treated equally.

Hearing Before the Senate Committee on the Judiciary on S.815 & S.1089, 98th Cong., 2d Sess., April 28, 1983 and August 3, 1983 at 37.

concepts of hostility and discrimination, and that the exclusion of a religious club from a forum generally open to other clubs would result in a student perception of hostility toward religion. (J.A. 392-394, 397, 399). Finally, two WHS students who would *not* have participated in the Bible Club testified that they would not view the existence of such a club at WHS as the promotion of religion, nor would they feel compelled to attend the meetings. (J.A. 211-12, 214-15).

Based on the unrebutted expert testimony, the students' testimony and the format of the clubs at WHS, the district court correctly held that high school students are not more impressionable than college students and that they are capable of making religious sponsorship distinctions. *Mergens*, Slip Op. at 11 n.1. The eighth circuit concurred in this finding, taking note that Congress, in passing the EAA, made the same finding. *Mergens*, 867 F.2d at 1080 n.2. The students at WHS are quite capable of distinguishing between student expression and school endorsement.

This Court has recognized that high school students are able to distinguish student speech from school endorsed speech. In *Tinker*, students did not perceive a fellow student's protest of the Vietnam War as endorsed by the school. Likewise, a student's refusal to salute the flag because of religious convictions was not perceived as the school's endorsement of the student's religious or political views. *Barnette, supra*. The utilization of the Bible as history or literature in a class at public school does not imply endorsement of the Bible's teachings. *Schempp*, 374 U.S. at 225. Accommodating students by granting "released time" for religious instruction off campus does not constitute the imprimatur of state approval. *Zorach, supra*. Finally, the existence of controversial books in the school library does not constitute state approval of the content. *Pico, supra*.[49] This Court's view of the free speech

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[49] Justice Powell, in *Bender*, correctly noted that "I do not believe – particularly in this age of massive media information – that the few years difference in age between high school students and college justifies departing from Widmar." *Bender*, 474 U.S. at 556 (Powell, J., dissenting).

rights of high school students does not change merely because religious speech is involved.

3. An Equal Access Policy Does Not Foster Excessive Government Entanglement With Religion.

Permitting a voluntary, student-initiated Bible Club to meet during noninstructional time does not foster an excessive government entanglement with religion. Enforcing a ban against religion at WHS would prove to be far more entangling than a neutral policy of equal access. *Widmar*, 454 U.S. at 272 n. 11. In rejecting the entanglement argument, the *Widmar* Court observed that the "University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 273 n.11 (*quoting O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979)).[50]

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[50] *Walz v. Tax Commission*, 397 U.S. 664, 674-75 (1970) (granting tax exemptions to churches gives rise to a lesser governmental involvement than would taxing it); *Cantwell*, 310 U.S. at 305 (requiring official determination of what is and what is not a "religion" violates the First Amendment).

Sen. Levin spoke directly to the entanglement prong of the *Lemon* test and observed:

> Critics of the Hatfield amendment are concerned that it will force school officials to become involved in delicate decision making about whether groups should be permitted to meet because of the religious content of their speech. This argument is faulty for two reasons. First, it is precisely because the law is in the state of chaos that legislation is needed in order to clarify what is and what is not permitted under the first amendment. Second, school officials are now being forced to make difficult decisions each time students request to meet when the subject of the meeting could be religion. For example, if a student-initiated group requests the

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In view of the nature of the activity permitted under the EAA and the *de minimis* amount of school supervision needed to implement it, no serious contention can be made that the Act creates excessive entanglements.[51] Likewise, as was established at trial, teacher involvement in WHS clubs constituted custodial monitoring. (J.A. 92, 111-12, 123-24, 184, 247). The presence of a teacher at the Club meeting as a custodial monitor is the kind of "limited and incidental entanglement between church and state authority [that] is inevitable in a complex modern society" and certainly does not constitute an excessive entanglement forbidden by the Constitution. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 736, 747 (1976).

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> use of school premises to talk about "moral issues," school officials would have to make further inquiries before granting the request. Will the group be discussing philosophy or theology? If the students plan to talk about religion, should the school deny the request? Clearly, school officials already face difficult decisions. The Hatfield amendment will make their job easier.

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin). *Accord, id.* at S8348 (remarks of Sen. Danforth); *id.* at S8363 (remarks of Sen. Mitchell).

Since § 4071(e) of the Act states that it does not authorize the Federal government to deny or withhold federal financial assistance to any school, no contention can be made that the Act creates *Federal* government entanglement with student-initiated religious groups.

[51] Representative Goodling stated:

> There are some who say the bill makes school administrators decide what is religion. That is totally wrong. This bill does not create such entanglement with religion. This bill applies to all noncurricula meetings, regardless of whether religious or not. So there is no entanglement with religion because school administrators will make their decisions governing

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In short, neither a policy of equal access nor the Equal Access Act violates the Establishment Clause.

CONCLUSION

For these reasons, the Court should affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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such meetings for all noncurricula-related meetings, religious or otherwise.

130 Cong. Rec., H7732 (daily ed. July 25, 1984).